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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 17

WALTER HUMPHREY, ETC., ET AL., *Petitioners*

v.

C. W. MOORE, ETC., ET AL., General Drivers, Warehousemen and Helpers, Local Union No. 89, and Dealers Transport Company, *Respondents*

On a Writ of Certiorari to the Court of Appeals of the State of Kentucky

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky (R. 25-34), is reported at 356 S.W. 2d 241. The opinion, order and judgment of the Jefferson Circuit Court, Chancery Branch, First Division (R. 17-19, 22) are unreported.

JURISDICTION

The judgment and order of the Court of Appeals (R. 35), modifying its order granting permanent injunction (R. 24), were entered on February 13, 1962. A petition for rehearing was overruled May 4, 1962 (R. 35). On July 17, 1962, Mr. Justice Stewart entered an order extending until September 4, 1962, petitioners' time to file a petition for writ of certiorari (R. 62-63). This Court has jurisdiction under 28 U.S.C. § 1257 (3). As parties below (R. 29; 15-16, Tr. 196-199),[1] petitioners have standing. *Mine Workers* v. *Eagle-Picher Co.*, 325 U.S. 335, 338-339 (1945). Certiorari was granted on January 21, 1963 (R. 63). 371 U.S. 966.

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are set forth in the Appendix *infra*, pp. 55-57.

QUESTION PRESENTED

Whether a state court infringes the statutory authority and discretion of the exclusive bargaining representative to bind its constituents, deprives employees of the benefits of statutory exclusive representation, encroaches upon the federally protected collective bargaining process and thereby violates the Supremacy Clause of the Constitution of the United States, by prohibiting parties to a collective bargaining contract affecting interstate commerce from interpreting and applying it to require dovetailing of

[1] References to the printed Transcript of Record are designated "R."; occasional references to the typewritten Transcript on file with this Court are designated "Tr." References preceding a semicolon are to findings; succeeding references are to evidence.

seniority lists upon absorption of one employer's business by another because in the opinion of the court dovetailing unfairly and unjustly deprives employees of the surviving employer of seniority rights secured by the contract.

STATEMENT

A. The Multi-Employer Unit and Its Agreement

Transporters of new cars and trucks from assembly plants to dealers, so-called truckaway and driveaway companies (R. 10), who delegate collective bargaining responsibility and authority to Automobile Transporters Labor Division, hereinafter called Division (R. 10, 14, 52), constitute a nationwide multi-employer collective bargaining unit (R. 13).[2] The recognized exclusive representative of employees in that unit is National Truckaway and Driveaway Conference, hereinafter called Conference, on behalf of its member local unions, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (R. 9, 10, 14, 52-53, 54). The employers and the local unions respectively empower the Division and the Conference "to [negotiate and] sign the contract, the national agreement" (R. 52). Thereafter, a copy is subscribed by each employer and the local union representing his employees (R. 31; 39).

The three-year agreement effective March 1, 1961, provides for employer recognition of the Conference as "the exclusive representative of all employees in the classifications of work covered by this Agreement for purposes of collective bargaining as provided by the

---

[2] Cf. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 284 (1959).

National Labor Relations Act" (R. 9). It further provides:

> "The undersigned Employer agrees to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement.
>
> "The Employer further agrees to participate in joint negotiations of any modification or renewal of the Agreement and to become a part of the multi-employer unit set forth in the Agreement." (R. 13)

Provision is made for establishment of a bipartite permanent Local Joint Committee in each city where there are three or more companies covered by the Agreement and a bipartite permanent Joint Conference Committee consisting of "duly elected delegates" of the Division and the Conference (R. 10). The Committees are "to settle disputes which cannot be settled by the Employer and the Local Union in accordance with the procedure established herein" (R. 11).

The contract creates a grievance procedure (Article, 7), under which disputes not settled between the Employer and the Local Union involved may be appealed either to a Local Committee or the Joint Conference Committee (R. 11). However,

> "* * * all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony of both sides, shall make a decision." (R. 12)

The contract expresses "the intention of the parties to resolve all questions of interpretation by mutual agreement" (R. 13). It also states (R. 12):

> "Any decision of the Automobile Transporters Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved."

The contract declares that "seniority rights for employees shall prevail"; defines the events which break seniority; requires that seniority lists be maintained and provides for submission of seniority controversies to the grievance procedure (R. 9). Article 4, Section 5, reads as follows (R. 10):

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (Article 7)."

B. Application of the Agreement to the Absorption of E & L Routes by Dealers

Dealers Transport Company of Memphis, Tennessee (hereinafter called Dealers), and E & L Transport Company of Detroit, Michigan (hereinafter called E & L), rival carriers of new cars and trucks from the Ford Motor Company, Louisville, Kentucky assembly plant (R. 18, 25, 41-42), and General Drivers, Warehousemen and Helpers, Local Union 89 (hereinafter called Local 89), representing the Louisville terminal employees of both companies (R. 26; 1-2, 18, 54), are parties to the 1961 national agreement, having author-

ized their "negotiating representatives to sign" (R. 52). The printed copy signed by each Company is identical, although the "rider varies somewhat" (R. 39).

For some time prior to August, 1961, rumors reached Local 89 that Ford had decided, in view of its increased use of "piggy-back" rail transportation, to terminate one of its two Louisville carriers (R. 18, 25-26; 41, 42-43). When it appeared that E & L would be the one to go, Paul W. Priddy, president of Local 89 (R. 53), instructed his assistant, Leslie H. Atterbury (R. 45), to interview "officials of the two companies to determine [whether] there was going to be a sale, merger, trade or whatever it might be" (R. 57). In a conference with local officials of both companies, Atterbury was informed "that there was no kind of a trade, understanding, at all, between management of the two companies * * * that Ford Motor Company had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). On the basis of this information (R. 47, 49, 57), Priddy and Atterbury told the E & L men that it looked black for them and urged them to look for other jobs (R. 57, Tr. 210, 178, 180, 216), and Atterbury assured the Dealers' men that they had nothing to worry about (R. 47, Tr. 132, 178, 208, 115-116).

Nevertheless, rumors circulated of a deal between E & L and Dealers (R. 50, Tr. 254). In August, 1961, two E & L employees, petitioners Lewis and Baker, filed a grievance invoking Article 4, Section 5, of the Agreement and requesting that E & L employees be "sandwiched in" with Dealers' employees on the basis of seniority acquired at E & L and its predecessor company (R. 7, 28; 54-55, 59-60). When the griev-

ance came before the local committee (R. 55), Priddy stated "this is a matter of interpretation and should rightfully be decided by the people who negotiated the contract" (R. 56); whereupon, by unanimous agreement, the matter was "deadlocked" for submission to the full Committee (R. 48-49, 56). By that time Local 89 had discovered in the Federal Register an application by Dealers to obtain E & L's secondary movement rights out of Louisville (R. 47, 57, Tr. 243-245). However, since neither company had revealed "that one of the companies was buying some of the rights," Local 89 did not "know for sure what the facts were." (R. 57).

Shortly before the hearing before the full Committee, Priddy told the three Dealers' stewards in attendance that he favored dovetailing the seniority lists and that to oppose it, as they wished, was "actually * * * a short sighted view because * * * three months or six months from now Dealers Transport may be completely out of the picture and another carrier in, then you too would have no job * * *." (R. 56, Tr. 115-116, 135). Priddy urged the Committee to dovetail the seniority lists "in the interest of protecting the long time employees of both people, especially since the work is being transferred over to this other operation, in effect these people would be following their work." (R. 58). Priddy testified that his position would have been the same "had the other company been the successful one to stay" (R. 58), and that the opposition of Dealers' employees could not be controlling because "we represent both people and we don't get any money from one more than the other * * *. We have to present the facts and we have to protect people in spite of themselves." (R. 58, 59). He specifically denied any hostility to or bias against Dealers' employees (R. 54, 58).

Mack Snites, Dealers' Vice President and General Manager, followed Priddy and revealed authoritatively that there had been an "understanding between management of the two companies," as to "which one was going to stay"; that "Ford didn't order either one of us out." (R. 57-58, 49-50, 41). He explained that, to consolidate geographically, E & L had agreed to sell its secondary authority out of Louisville to Dealers in exchange for Dealers' initial authority out of Lorraine, Ohio (R. 42-43, 44, 50). Snites admitted that pursuant to this trade Dealers "absorbed a certain portion of" the "business of E & L." (R. 44; cf. R. 7).[3]

On the basis of this testimony (R. 57), the Committee issued a decision directing that within thirty days E & L employees "shall be sandwiched in" on Dealers' "master seniority boards." (R. 59-60). Dealers acquiesced (R. 44) and prepared to comply by replacing 96 junior employees of Dealers with senior E & L employees as of November 25, 1961 (R. 61).

C. Proceedings Below

On November 8, 1961, C. W. Moore, an employee of Dealers, on his own behalf and on behalf of Louisville terminal employees of Dealers as a class, filed in the Circuit Court of Jefferson County a suit for injunction and damages to prevent Local 89 and Dealers from complying with the decision (R. 1-15). Petitioners, Walter Humphrey, Howard Baker, Earl Surface, Ross Johnson, Arthur Gilpin and Ray Lewis, individually and as representatives of E & L employees as a class, were made defendants by amendment (R. 29; 15-16).

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[3] The colloquy reads (R. 44): "Have you taken over, have you absorbed the business of E. & L.? A. We have absorbed a certain portion of it."

The gravamen of the complaint was that the dovetailing decision violated the contract between Dealers and Local 89 (R. 55) inasmuch as a rider to that contract (R. 19), guaranteed all Louisville job opportunities to Dealers' employees[4] and Article 4, Section 6(b)(2), p. 15 of the agreement, dealing with transfers from a closed branch (R. 27),[5] rather than Article 4, Section 5, dealing with absorption by one carrier of the business of another, controlled (R. 5). It alleged that plaintiffs had relied upon the Union to "take care of their interests in [the] grievance" (R. 3); but that the Union had deceived them and "acted against [their] interest" and that the effect was to replace "at least 250 of the 300 original employees of Dealers Transport Company" with "the former employees of E & L Transport Company" (R. 5). Petitioners and Local 89 moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action (R. 21, 16) and Local 89 because "the jurisdiction of this Court has been preempted by the provisions of the National Labor Relations Act" (R. 21).

The trial court (Judge Macauley L. Smith), after hearing, denied both a temporary and a permanent injunction and granted the motion to dismiss (R. 17, 22). It concurred in the Committee's conclusion that Article 4, Section 5, governed and neither Article 4, Section 6, nor the rider, applied (R. 18-19). It stated: "no

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[4] The pertinent provision of the rider, which had been approved by the National Conference (Tr. 119, 232, 239), reads: "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal." (R. 19).

[5] Section 6(b)(2), provides that in cases of branch closings employees of the closed branch "shall go to the bottom of the seniority board."

contention is made that the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the Committee" and "it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented" (*ibid.*).

The Court of Appeals, two judges dissenting, reversed. It held the Joint Committee's adjudication of "job seniority rights" (R. 25) under the contract so "erroneous" and "violative of natural justice" as to be "arbitrary" (R. 31, 33). Agreeing with the trial court that neither of the provisions relied on by plaintiffs were pertinent (R. 27, 30), it concluded that Article 4, Section 5, did not authorize the decision because it "does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedures." (R. 31). Moreover, even though the contracts signed by Dealers and E & L are identical, "still they are separate agreements" and E & L employees can claim no benefits or rights under the Dealers contract (R. 31). Therefore, "the question was not arbitrable under the grievance procedure." (R. 31).

The court further held that the Union had no "legitimate business" in the grievance proceeding except as "advocate" of the contractual seniority rights of Dealers' employees and that it was disqualified by the "antagonistic interests" of its E & L constituents and the fact that Union influence "stood to be enhanced by a decision permitting the employment and seniority of its members to cut across company lines." (R. 32).

Finally, the court held that the validity of the decision was open to judicial review because state courts are empowered "to construe and enforce a contract under which [employees] have certain rights of tenure" (R. 29, 31, 33). In its view, absent a claim that the Committee's decision was predicated upon union membership or activity, vindication of such rights pursuant to state law does not amount to exercise of "any jurisdiction in the field of national labor policy." (R. 33).

Accordingly, the court below sustained the orders entered by Chief Judge Robert B. Bird on November 29, 1961 (R. 19-20) and December 15, 1961 (R. 24), enjoining the parties from "putting into effect or enforcing the decision * * * [and ordering] any employees who * * * have lost their jobs by reason of said decision * * * reinstated * * *" (R. 20, 24).

SUMMARY OF ARGUMENT

I

Teamsters Union v. *Oliver*, 358 U. S. 283 (1959) controls this case because the power and freedom of the contracting parties to adjust petitioners' grievance by agreeing to dovetail seniority lists is an aspect of federally protected collective bargaining. To treat individual rights of tenure as a bar to agreement is incompatible with the concept of collective bargaining as "a continuous process" (*Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 525 (1949)), in which individual interests in prospective employment are necessarily subordinated to the collective interest.

Freedom to bargain collectively means unlimited power to solve by agreement the problem of displace-

ment created by Dealers' absorption of the E. & L.'s routes; to adjust prospectively grievances arising therefrom and to interpret and apply the contract as it relates thereto. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723, 739 (1945). Striking down the parties' dovetailing solution constricts the subject matter of collective bargaining and destroys the finality which federal law attaches to it.

Nothing in Section 301 authorizes courts, in the name of enforcing individual rights created by collective agreements, to mutilate the collective bargaining process. Power to enforce individual rights is conferred only to enhance the policy of promoting collective bargaining. Individual rights can be recognized only if, and to the extent that, they do not trench upon the statutory authority of the exclusive bargaining agent. Section 301 cannot be used as a device for reallocating authority as between collective and individual interests, overriding Sections 9(a) and 8(d).

II

The federal function of the exclusive bargaining agent includes resolution of conflicts of interest over seniority and tenure among competing groups of constituents. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 527 (1949). The process is a legislative one; its purpose is promotion of the collective interest. Individuals and groups have no statutory role in that process, and where, as here, the bargaining agent seeks to promote the collective interest in good faith and does not engage in hostile, invidious, discrimination, none can claim legal injury. Dovetailing is generally regarded as the most equitable solution in merger and absorption cases and is, in any event, indisputably within the ambit of the bargaining agent's author-

ity and discretion. *Kahn, Seniority Problems in Business Mergers,* 8 Ind. & Lab. Rel. Rev. 361, 378 (1955).

III

The federal duty of fair representation preempts the field of obligations owed by a bargaining agent, as such, to its constituents. State courts are not empowered either to invoke their own standards or to enforce the federal one because the duty is a corollary of and inextricably interwoven with the exclusive representatives' power to bind its constituents, and enforcement decisively shapes the capacity of the representative to perform its federal functions. The power and the duty together displace agency concepts derived from state law, concepts which Congress deliberately repudiated. As this case shows, to allow state court participation would invite their reappearance. The National Labor Relations Board is empowered to police the duty of fair representation at least through its control over certifications (*Larus & Brother Co.*, 62 NLRB 1075 (1945)), and perhaps through the unfair labor practice provisions as well. *Plumbers' Union* v. *Borden,* 373 U. S. 690, 696, n. 7 (1963). Thus, *vis-a-vis* State courts, there is an "inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board,* 353 U. S. 1, 10 (1957).

IV

The state court's disclaimer of intention "to exercise any jurisdiction in the field of national labor policy" emphasizes the need for explicit reaffirmation that the process and the products of collective bargaining affecting interstate commerce are, in all respects, within that field.

ARGUMENT

Teamsters Union v. *Oliver*, 358 U.S. 283 (1959), controls this case. Like the "lessor-driver" clause Ohio illegalized, the dovetailing decision which the court below set aside is "the product of the exercise of federally sanctioned collective bargaining rights." *Oliver* case, *supra*, 358 U.S., at 289, 297. It has "the imprimatur of the federal law upon it * * *." *Railway Dept.* v. *Hanson*, 351 U.S. 225, 232 (1956). Destruction defeats Congress' object in fostering collective bargaining under the aegis of federal law and deprives employees of the benefits that system is designed to secure. To attack a product of contract administration which comports with "the federal scheme" is as "fatal to the goals of the Act" (*Machinists* v. *Central Airlines*, 372 U.S. 682, 691 (1963)), as to strike down the contract itself.

I.

FEDERAL LAW GUARANTEES AND PROTECTS FREEDOM TO BARGAIN COLLECTIVELY ABOUT ABSORPTION OF DISPLACED EMPLOYEES

A. Individual Rights Are Vulnerable To Collective Bargaining During the Contract Term

The court below held the Joint Committee powerless to grant petitioners' grievance on the ground that the contract as written does not compel an acquiring company to employ displaced employees, or give displaced employees a right to be absorbed (R. 31). In consequence, in its view, the contract gives employees of the acquiring company a vested immunity against compulsory absorption. The unarticulated premise is that rights and immunities affecting tenure are invulnerable during the life of a collective agreement. The short answer is that they are not.

The interest of groups and individuals in continuing to enjoy the benefits of a collective bargaining contract as written does not brake the power of the contracting parties to make changes. "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 525 (1949).

> "Neither the right of a Union to bargain for its members nor the correlative duty of an employer to recognize and bargain with such agent ends upon the signing of a contract. 'For the collective bargaining power is not exhausted by being once exercised; * * *.' *Elgin, Joliet and Eastern Railway Co.* v. *Burley*, 325 U.S. 711, 739." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961).

The Act recognizes that contracting parties are empowered by agreement during the life of their contract to change its terms and conditions. Section 8(d), added in 1947, guarantees each party against compulsion "to discuss or agree to any modification of the terms and conditions contained in a contract * * * if such modification is to become effective before said terms and conditions can be reopened under the provisions of the contract * * *." Enactment reversed the rule that the duty required bargaining over modification.[6] The new provision thus assumes that the parties are at liberty to modify by agreement, for it would be pointless to protect against compulsion if there were no power to make effective changes voluntarily. If employee interests in existing benefits and

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[6] Weyand, *The Scope of Collective Bargaining Under the Taft Hartley Act*, in N.Y.U. First Ann. Conf. on Labor 257, 260 (1948).

terms and conditions were a bar, contracting parties would be powerless to bargain for modifications.

To treat rights established by an agreement as immutable during its life is not only to disregard the character of collective bargaining as a "continuous process" but to elevate individual and group interests above the "collective interest [which] by law * * * the Union [is] charged with protecting." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 666 (6th Cir. 1961). This, the National Act forbids. The statutory authority of the exclusive agent completely occupies the field of bargaining over tenure and terms of employment. "The majority union is * * * vested by statute with exclusive authority to speak for and bind the individual, and his freedom of choice is limited to participating in the majority election which determines which is the union.'" Once an exclusive representative has been chosen by the unit, "all powers which the employees theretofore had to contract with their employer either individually, in groups, or through some agent of their choice become vested exclusively in the statutory bargaining representative.'"[7]

Individuals or groups cannot by contract limit the exclusive agent's authority or defeat it by making agreements of their own. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944); *May Stores Co.* v. *Labor Board*, 326 U.S. 376 (1945); *Labor Board* v. *Crompton Mills*, 337 U.S. 217 (1949). Individual or group agreements must be superseded by the collective agreement

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[7] Summers, *Collective Power and Individual Rights in the Collective Agreement*, 72 Yale L.J. 421, 423 (1963).

[8] Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257, 270 (1948).

because contracts made on behalf of individuals and groups do not serve the collective interest. *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). For the same reason, if rights and immunities established by a collective agreement cease to serve that interest, their preservation in the interest of individuals or groups would be incompatible with the goal of the statute.

Unfettered power in the exclusive representative to appraise the collective interest is the *sine qua non* of its vindication. "Unless those upon whom is placed the responsibility for protecting collective interests are given the authority needed to discharge such responsibility, the entire process is of doubtful worth." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 667 (6th Cir. 1961); *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F. 2d 179, 186-187 (2d Cir. 1962).

"The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards." Cox, *The Duty To Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1407 (1958). That purpose can be achieved only by subordinating individual and group interests to the collective interest, and entrusting effectuation of that interest to the democratically chosen exclusive representative. Therefore, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and to restrict the rights of those who it represents." *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 204 (1944); *Hughes Tool Co.* v. *NLRB*, 147 F. 2d 69, 72-73 (5th Cir. 1945). In *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 388 (1944), this Court said:

> "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."

To the argument that "some employees may lose by the collective agreement" this Court replied (*ibid.*, at 338-339):

> "Its benefits and advantages are open to every employee of the represented unit * * *.
>
> "[Beyond that, the] practice and philosophy of collective bargaining looks with suspicion on * * * individual advantages. * * * [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are * * * often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. * * * The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."

To immunize individual or group rights of tenure against the authority of the bargaining agent is, consequently, to reject the rationale of statutory collective bargaining. "There are countless situations in which the very concept of collective action demands that unions have the power to influence the employer to make changes in the job status of individual employees." *NLRB* v. *Local 294, Teamsters*, 317 F.2d 746, 751 (2d Cir. 1963). The complaint on its face shows (R. 5)

that Dealers' employees sued to retain the seniority benefits they had derived from collective representation in the past at the expense of contemporary effectuation of the collective interest. They sought to jettison selected disadvantages of collective action while preserving selected advantages. Collective bargaining as an institution could no more survive such assault than Government could survive without taxes.

The fundamental error of the court below lay in assuming authority to consider the contract a source of limitation upon the power of the exclusive representative and the employer jointly to control terms and tenure of employment. That power flows from the statute. It is not subject to external limitation as an incident of judicial enforcement or interpretation of the parties' contract. Of course if a collective agreement provides that a right or immunity shall not be altered during its life either party may insist that the other adhere to that commitment. But third parties are forbidden to foreclose them from mutually agreeing to change. Foreclosure would restrict the scope of voluntary collective bargaining, in the teeth of Section 8(d), reducing its utility as an instrument of industrial peace. *Labor Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958); *Labor Board* v. *American Ins. Co.*, 343 U.S. 394, 405, n. 15 (1952); *Oliver* case, *supra*, 358 U.S., at 295.

Thus, even a provision expressly forbidding bargaining about employment of persons affected by future mergers or absorptions would have been no bar to the parties. Once "the majority * * * collectivizes the employment bargain" individuals and groups are not empowered to thwart the process by which tenure may be considered and adjusted in the common

interest of all. "Chaos would result if every disenchanted employee * * * could harass both the union and the employer * * *." *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F.2d 179, 186 (2d Cir. 1962). For a court to interfere in the interest of enforcing individual rights is to violate the "right of the employees protected by Section 7" to bargain collectively "through their representatives." *Oliver* case, *supra*, 358 U.S. 283, 295.[9]

Since, instead of forbidding, the contract requires, the parties to bargain over future mergers and absorptions,[10] interference to protect the *status quo* is, *a fortiori*, prohibited. "Whether a contract should contain a clause fixing standards for such matters [as mergers] * * * or should provide for more flexible treatment * * * is an issue for determination across the bargaining table * * *." *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409 (1952). Where the parties

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[9] Cf. *Lewellyn* v. *Fleming*, 154 F. 2d 211, 214 (10th Cir. 1946); *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50 (10th Cir. 1956), cert. denied, 351 U.S. 918 (1956); *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664-667 (6th Cir. 1961); *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.*, 159 F. 2d 822, 826-827, 828 (5th Cir. 1947); *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123 (1956), cert. denied 352 U.S. 937 (1956); *Edelstein* v. *Duluth, M. & I. R. Co.*, 225 Minn. 508, 31 N.W. 2d 465, 472-473 (1948); *Napier* v. *System Federation No. 91*, 127 F. Supp. 874, 888-889 (W.D. Ky. 1955); *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa. 1959).

[10] "Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization. Deliberate ambiguities, inadvertent omissions, and unforeseen contingencies require continual rule making which, passing in the guise of interpretation, parallels the law making of courts and administrative agencies." Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 606 (1956).

choose flexible treatment through the grievance procedure, Section 8(d) imposes upon them a duty to bargain collectively when the problems envisaged arise.[11] "The grievance procedure is * * * a part of the continuous collective bargaining process." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

> "It is * * * settled law that the union's right to bargain and the employer's correlative duties are not limited to the negotiation of an agreement. Both the NLRB and the courts have consistently held that to refuse to discuss grievances and questions of contract interpretation violates section 8(a)(5)." Cox, *op. cit. supra*, note 10, p. 622.

Here, as elsewhere when it "required [the parties] to negotiate in good faith toward solving" a problem

> "Congress was not concerned with the substantive terms upon which the parties agreed. * * * [It left them] to work out their agreement themselves." *Oliver* case, *supra*, 358 U.S., at 296, 295.

Since "the federal law operates here, in an area where its authority is paramount, to leave the parties free" for a court to limit "the solutions that the parties' agreement can provide" is necessarily inconsistent with federal policy and "outside the power of the State." *Oliver* case, *supra*, 358 U.S., at 296.

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[11] See generally, Weyand, *Majority Rule In Collective Bargaining*, 45 Col. L. Rev. 556 (1945); *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257 (1948); Cox & Dunlap, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389 (1950); Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 Col. L. Rev. 170 (1951).

If, as we have seen, the premise that individual rights of tenure arising from a collective bargaining contract are invulnerable to defeasance by mutual agreement is incompatible with the statutory concept of collective bargaining, power to impose limitations cannot be predicated upon such rights. To hold otherwise would defeat the very public policy which is the source of the contract. See pp. 38-39, *infra*. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

B. Individual Rights Cannot Thwart Prospective Adjustment of Grievances

The court below trenched upon the federally guaranteed freedom of the contracting parties to adjust grievances. In *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945), this Court recognized that insofar as grievances entail adjustments looking to the future, the bargaining agent has inherent authority by virtue of its statutory status to dispose of them in the collective interest. It was precisely in defining the boundaries of the agent's statutory authority that prospective adjustments were distinguished from retroactive ones. *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961).[12] This Court distinguished on the ground that collective bargaining looks

> "* * * to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> * * *
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> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently

[12] See also, *Hughes Tool Co.* v. *NLRB*, 147 F. 2d 69, 72-73 (5th Cir. 1945); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202 (1944).

> of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
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> "But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances." *Elgin* case, *supra*, 325 U.S., at 723, 739.

Congress codified this definition of collective bargaining and approved the distinction between fully matured and prospective claims in Section 8(d) and the amendment to Section 9(a).[13] The broad definition in Section 8(d) shows that Congress agreed that "effective collective bargaining * * * include[s] the right of the representative of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions" because "exceptional situations often * * * introduce competitions and discriminations that are upsetting to the entire struc-

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[13] Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257, 277-278 (1948); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Col. Rev. 730, 735-751 (1950); cf. Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 621-624 (1956).

ture." *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 346-347 (1944). Accordingly, in adding authority to adjust "without the intervention of the bargaining representative" to the preexisting authority of individuals and groups to "present" grievances, Congress must have contemplated "grievances" in the *Burley* sense, *i.e.*, fully accrued and matured claims which are not encompassed in the statutory authority of the exclusive representative. The legislative history shows that the amendment was designed to "accord with" *Burley*. 1 Leg. Hist., L.M.R.A., 781; 93 Cong. Rec. 3624-3625 (1947). To include prospective adjustments would attribute to Congress an intent to defeat the very collective representation which it considered essential to fair resolution of conflicts of interest.[14]

It is unthinkable that courts are empowered to protect individual rights to prospective employment at the expense of the authority of the bargaining agent to adjust grievances prospectively. So to hold would remove grievance adjustment from the sphere of collective bargaining. Since the adjustment petitioners requested related to future employment only, their grievance was within the statutory province of the exclusive bargaining agent to adjust. Interference invaded the preempted field and deprived petitioners of their Section 7 right to have their grievance adjusted by the exclusive bargaining agent. *Hill* v. *Florida*, 325 U.S. 538 (1945).

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[14] Cf., *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628, 637 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963), with *Union News Co.* v. *Hildreth*, 295 F. 2d 658 (6th Cir. 1961), and *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F. 2d 179, 184, 186 (2d Cir. 1962).

C. Individual Rights Cannot Impair the Power of Contracting Parties to Agree Upon Interpretation of Their Contract

The court below likewise trenched upon the federally guaranteed power of the contracting parties to interpret their own agreement. Congress defined "collective bargaining" in Section 8(d) to comprehend resolution of any "question arising * * * under" a collective agreement. Questions as to the meaning and scope of the agreement, such as whether Article 4, Section 5, encompasses dovetailing, are indisputably questions "arising * * * under" the agreement. Petitioners' request (R. 2-3) that they "be sandwiched in with the employees of Dealers Transport Company and given seniority on the basis of the seniority which * * * they had acquired with E & L Transport Company" clearly posed such a question. Even on the view of the court below, petitioners' grievance entailed "interpretation" of the agreement in "application" to the situation created by Dealers' absorption of E & L routes.

The contention (R. 31) that absorption is not within the realm of interpretation because the contract "does not mention" initial employment "is pure sophistry." *Livingston* v. *John Wiley & Sons*, 313 F. 2d 52, 60 (2d Cir. 1963), cert. granted, 373 U.S. 908 (1963). It has been held that controversies over seniority created by mergers, consolidations, purchases, etc., are not excluded from the area of interpretation by the fact that separate employers are involved, even if there is no multi-employer unit. *Livingston* case, *supra*, 313 F.2d, at 56. Consequently, even if the view of the court below on the merits were arguable, the issue raised by petitioners' grievance would be within the scope of the contracting parties' power to settle. To vitiate their resolution is to contravene the directive of federal law

that such questions should, if possible, be resolved by the contracting parties within their own "system of industrial self-government." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960).

Section 203(d) places the matter beyond dispute, for it provides that "grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" should be settled finally by a method "agreed upon by the parties." The contracting parties were authorized both to select the method by which the absorption question should be adjusted and to make adjustment by that method "final." They did this by providing for submission to the Joint Committee and declaring its decisions "final and conclusive and binding upon the Employer and the Union, and the employees involved" (R. 12). Congress could not have made it plainer that such declarations are to be respected. *Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963).

To upset an interpretation agreed on by the parties in the interest of individual or group "rights" is entirely inconsistent, moreover, with the plain language of the proviso to Section 9(a). That proviso accords to individuals the right to present and adjust grievances without the intervention of the bargaining representative only "as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect." Dealers' employees were thus barred by the proviso from processing as a grievance the complaint they presented to the court below because the "adjustment" they sought was inconsistent with the terms of the "agreement then in effect," as both of the contracting parties construed it. "Parties to a contract may agree as to its meaning.

* * * That is what the interpretation here amounted to." *Edelstein* v. *Duluth, M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N.W. 2d 465, 472 (1948). Congress did not empower courts, any more than it empowered employers, at the instance of individuals or groups to make "adjustments" inconsistent with the terms of an existing collective agreement.

D. Dovetailing May Not Be Excluded from the Scope of Collective Bargaining

For federal preemption of the collective bargaining process and Congress' assurance to the parties of freedom to devise their own terms of settlement of industrial disputes, the court below substituted restrictions grounded in free-wheeling "common sense" (R. 32) and "natural justice" (R. 33) notions. The effect is to remove absorption of displaced employees not merely from the area of mandatory collective bargaining (*Oliver* case, *supra*, 358 U.S., at 294-295), but even from the area of permissible bargaining, making it a unique management prerogative. But "seniority rights * * * are mandatory bargaining subjects." *Marine & Shipbuilding Workers* v. *NLRB*, 3 Cir. decided July 30, 1963, 53 LRRM 2878, 2882; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (1949). The court below assumed power to forbid what, on any theory, federal law allows. A result more antithetical to Congress' choice of collective bargaining as the ideal solvent for employment problems is impossible to imagine.

The conflict is grounded in the view of the court below that to make tenure dependent upon the decision of the bargaining agent is to reduce employees "to the status of pawns instead of free men" (R. 33).

Thus, collective bargaining is equated with serfdom. Congress, however, equated collective bargaining with freedom.

> "The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide * * * for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted. * * * [I]t provides a framework within which the process of collective bargaining may be carried on * * *. [It permits] reason and not force * * * to have sway in industrial relationships * * *. [Collective agreements] not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer." *NLRB* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 638 (4th Cir. 1940).

Congress considered collective bargaining the democratic alternative to industrial feudalism. In the industrial world, as in society, the price of freedom is submission to the authority of democratic government to make, interpret and enforce law. Obedience is not serfdom; it is freedom's alternative to anarchy.

The court below chose anarchy. Its opinion does not appear to hold that the seniority rights of Dealers' employees barred Dealers from employing E & L employees if Dealers should elect to do so. Once "the absorbing company agrees to take the employees of the Company whose business is being absorbed" (R. 31), Article 4, Section 5, admittedly comes into play.

Thus, "if [Dealers'] does take them," the seniority rights of its employees would not preclude dovetailing or any other solution of seniority questions under the grievance procedure. It would seem that if the contract rights of Dealers' employees are not enough to bar dovetailing after Dealers hires E & L employees, they would not be enough to prevent Dealers from hiring them.

On this hypothesis, the absorbing company has an option to employ or not as it pleases. However, since the absorbing company explicitly agreed "to be bound by the interpretations and enforcement of the Agreement" (R. 13, Art. 38), this option cannot be attributed to the contract. It must, and does, reflect a rule of state law prohibiting an absorbing employer from delegating to his representative, or bargaining away in advance, his power of decision in this area. Cf. *Local 1976, Carpenters* v. *Labor Board*, 357 U.S. 93, 106-107 (1958). Such a rule drastically curtails, if it does not altogether destroy, power to bargain collectively about absorption. And the effect, of course, is to reduce all employees again to the status of "pawns" of employers, "for the circumstance of the [absorption is] a matter beyond [employees'] control * * *." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322 (1955). And so Kentucky would destroy the entire "practice and philosophy of collective bargaining" for the sake of short run "individual advantages * * * paid at the long range expense of the group as a whole." *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 338-339 (1944).

Employment of displaced employees, like abolition of jobs (*Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 340-341 (1960)); subcontracting (*Fiber-*

board Products Corp. v. *NLRB*, 53 LRRM 2666 (D. C. Cir., July 3, 1963), enforcing 138 NLRB No. 67, 51 LRRM 1101; *Town & Country Mfg. Co.* v. *NLRB*, 316 F. 2d 846 (5th Cir. 1963)); potential attrition of job opportunities through inadequate rentals for leased equipment (*Oliver* case, *supra*, 358 U.S., at 294), and other matters which affect availability, "security, seniority and stability of * * * jobs" (*Telegraphers* case, *supra*, 362 U.S., at 340), is "subject matter as to which federal law directs [the parties] to bargain" (*Oliver* case, *supra*, 358 U.S., at 295). Who is to have jobs and rules to govern such decisions are self-evidently included in the phrase "terms and conditions of employment." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 525-527 (1949); *NLRB* v. *Local 294, Teamsters*, 53 LRRM 2248, 2251 (2d Cir., May 21, 1963). "It is not to be doubted that an [employer] and a labor union representing the [employer's] employees, lawfully may bargain about and agree upon matters in mitigation of hardships to employees who are displaced by * * * unifications or abandonments * * *." *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 357 (1960) (dissenting opinion); *United States* v. *Lowden*, 308 U.S. 225, 230, 233, 235-236, 238 (1939); *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963).

> "What is under the 'protection' of the federal Act in this case is the freedom to resolve at the bargaining table the problem of * * * seniority rights raised by [Dealers' absorption of E. & L.'s routes]. * * * To enjoin defendants * * * would be to unduly restrict that freedom of collective bargaining which the Supreme Court has declared

to be one of the paramount objectives of the Federal Act." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 331 (1955).

To say that this freedom does not exist until the absorbing employer unilaterally undertakes to hire the employees of the absorbed company is to overlook that Section 2(3) of the Act specifically says that the term "employee * * * shall not be limited to the employees of a particular employer"; and that Section 2(9) defines "labor dispute" to include controversies over "*tenure*" of employment "regardless of whether the disputants stand in the proximate relation of employer and employee." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177 (1941). Moreover, it is to ignore the historic predicate of the concept, central to the entire Act, that "[t]o render [unionization] at all effective, employees must make their [Union] extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united * * *." *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 502-503 (1940).

Not only is there no rationale in federal policy for excluding the subject of absorption from the area of collective bargaining, federal policy manifestly compels its inclusion. Thus, it is obvious that "when a merger involves two or more groups of employees each having separate seniority rights * * * [i]ndustrial strife may arise by reason of a dispute between the two or more groups * * *." *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263, 266 (2d Cir. 1953), cert. denied, 346 U.S. 826 (1953). "The now extensive history of legislation regulating the relations of * * * employees and employers plainly evidences the awareness of

Congress that" resolution of such disputes through collective bargaining promotes "just and reasonable treatment of * * * employees," avoids disruption of commerce through strikes and "promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored." *United States* v. *Lowden*, 308 U.S. 225, 235-236 (1939). Therefore, national policy demands that "the issue should be resolved," not unilaterally by the employer, but "by negotiation or arbitration." *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 226 (1960); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 249-250, 74 N.W. 2d 322, 328 (1955).

By its approval and encouragement of multi-employer unit bargaining (*Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94 (1957)), national policy facilitates the enhancement of job security which results when conventional seniority is permitted to cross the single employer line. Employees may regard this as one of the major advantages of multi-employer bargaining. At least where, as here, employers have countered their employees' choice of the same bargaining representative with creation of a multi-employer unit, "[n]othing in the * * * Act * * * so limits the vision and action of a bargaining representative that it must * * * limit seniority * * * solely to" (*Huffman* case, *supra*, at 343), employees of a single employer.[18]

The court below predicated a legal limitation on the theory that signature of separate though identical contract booklets kept each employer and his employees "strangers" to the others (R. 31). But the National

[18] See, *e.g.*, Wortman, *Labor Relations Decision-Making in the Membership of Employers' Associations*, 14 Lab. L.J. 587 (July, 1963).

Labor Relations Board treats that form of signature as evidence of membership in a multi-party unit and "consent to be bound" by a uniform contract.[16] Thus, the court below grounded decision upon fragmentation and destruction of multi-employer bargaining which federal law fosters and protects.

If, however, the opinion can be read as requiring the Joint Committee to respect "rights of tenure" of Dealers' employees (R. 33), rather than Dealers' discretion to employ or not to employ E & L men, the conflict is not lessened. Federal law denies, and consequently precludes the states from attributing, to seniority rights immunity to alteration by the bargaining agent at any time. The "conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526 (1949)); include future "promotions, transfers, layoffs and similar matters." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Therefore, to treat seniority rules and tenure flowing from their prospective application as "vested rights" would exhaust the bargaining process by a single exercise, thwarting its capacity to deal with changed conditions. Seniority would become not a "part of the process of collective bargaining" (*Campbell* case, *supra*, 337 U.S., at 526), but a negation of it.

It is therefore almost universally recognized that alteration of systems of seniority and their consequences is within the province of the exclusive bargaining agent in the process of contract modification, interpretation

[16] *Neville Foundry Company*, 122 NLRB 1187, 1188 (1959); *Charles H. Harper and Frank Harper*, 117 NLRB 1031, 1032 (1957); NLRB, *Twenty Fourth Annual Report* (Govt. Print. Off. 1960), p. 40.

and enforcement.[17] Of course, the fact that alteration adversely affects the tenure of some does not make it taboo. "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Were it otherwise the province of collective bargaining would be narrow indeed. "Seniority rights provided for in a collective agreement may be modified or eliminated by agreement of the union and the employer so long as they act in good faith, and this change may be affected

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[17] Recognition that seniority rights are susceptible not only to interpretation but to change by agreement of the bargaining agent and the employer is virtually universal. *E.g.*, *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9th Cir. 1953), cert. denied, 346 U.S. 931 (1954); *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 188 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962); *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks*, 217 F. 2d 205 (5th Cir. 1954), affirming S.D. Fla., 118 F. Supp. 254 (1953), cert. denied, 349 U.S. 912 (1955); (but cf. *Woodward Iron Co.* v. *Ware*, 261 F. 2d 138 (5th Cir. 1958)); *Elder* v. *N. Y. Central R. Co.*, 152 F. 2d 361, 364, 365 (6th Cir. 1945); *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (4th Cir. 1953); *Starke* v. *New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir. 1950); *Johnson* v. *Archer-Daniels Midland Co.*, 203 F. Supp. 636, 638, 640 (E.D. Mich. 1962); *Giordano* v. *Mack Trucks, Inc.*, 203 F. Supp. 905 (D. N.J. 1962); *Donovan* v. *Travers*, 285 Mass. 167, 188 N.E. 705, 707 (1934); *Cortez* v. *Ford Motor Co.*, 349 Mich. 108, 84 N.W. 2d 523 (1957); *Walker* v. *Penn-Reading S. Lines*, 142 N.J. Eq. 588, 61 A. 2d 453, 462-463 (1948); *Coley* v. *Atlantic Coast Line R. Co.*, 221 N.C. 66, 19 S.E. 2d 124 (1942); *Roberts* v. *Western P.R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123, cert. denied, 352 U.S. 937 (1956); *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528 (1956); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915 (1958); see also, *Oddie* v. *Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), reversing 195 F. Supp. 826 (1961), cert. denied, 371 U.S. 956 (1962); *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, 103 (2d Cir. 1961), aff'd without consideration of this issue, 370 U.S. 530 (1962). There is, of course, no occasion here to consider whether, as the Second Circuit held in *Zdanok*, seniority rights created by a contract survive its expiration.

without the consent—indeed against the wishes—of the individual employees." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962).

E. Authority to Enforce Individual Rights Arising From Collective Agreements Does Not License Destruction of Collective Bargaining

Section 301 assigns to courts a narrow role. They are empowered and directed to enhance respect for the collective bargaining process by enforcing its results without "reweigh[ing] the merits." *Drivers Union* v. *Riss & Co.*, 372 U.S. 517, 519 (1963); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960).

> "The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 509 (1962).
>
> "In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S. Rep. No. 105, 80th Cong., 1st Sess. 17). * * * The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§ 203(d) of the Act,

29 U.S.C. § 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566)." *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 263 (1962).

Congress did not restrict to the federal courts the obligation to honor the products of collective bargaining. To the extent that state courts lay hold they are bound to apply only federal substantive law.

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. *The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.* With due regard to the many factors which bear upon competing state and federal interests in this area, *California* v. *Zook*, 336 U.S. 725, 730-731; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962). (Emphasis added.)

It follows that in challenging and upsetting the parties' administration of the contract, the court below trod forbidden ground. Under federal law the power of the Joint Committee to dovetail could have come into controversy only if one of the contracting parties had refused to entertain or consider petitioners'

grievance and suit had been brought by the other to compel its consideration or arbitration, or if the party to whom the decision was directed had challenged the Committee's authority. In that event, a court would have been empowered to decide under the appropriately narrow federal standard whether an *ultra vires* issue was open. *Drivers Union* v. *Riss & Co.*, 372 U.S. 517, 519-520 (1963); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568, 569 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

But that is not this case. The court below conceded that Dealers "feels bound to honor this contract" and the Joint Committee decision (R. 32). Where contracting parties agree that a grievance arises under and is governed by their contract, courts are not empowered to override. No matter how "arbitrary" or "erroneous" the parties' agreement may appear to a court, it may not be challenged, for even if the parties are "wrong" as a matter of "interpretation" their agreement would be entitled to finality as modification.

Even on the hypothesis that the Joint Committee's interpretation of Article 4, Section 5 was open to scrutiny, however, the court below clearly erred. Instead of leaving the initial employment question at large, that Section plainly assumes that the acquiring employer must and will employ the employees of the absorbed enterprise, leaving only the seniority issue to be resolved. The contrary interpretation makes wholly illusory a clause which the parties obviously intended to be enforceable. An acquiring employer could unilaterally defeat its operation by refusing to hire displaced employees, thereby pretermitting any seniority controversy completely.

In any event, the Committee's view is at least arguable. If the contracting parties had disagreed, Section 301 would have compelled submission to arbitration. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Dovetailing by an arbitrator would assuredly have been immune, for courts "have no business weighing the merits of a grievance, considering whether there is equity in a claim, or determining whether there is particular language in the written instrument which will support the claim * * *." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960). If courts cannot substitute their interpretation for that of an arbitrator when the parties are in disagreement, *a fortiori*, they have no business substituting their judgment for that of both parties. Deference to arbitrators is designed to encourage contracting parties who cannot agree to submit to arbitration as an alternative to strike action. Encouragement of arbitration is a supplement to, not a substitute for, encouragement of settlement by agreement. There is "no room in this scheme" for "state policy limiting the solution that the parties' agreement can provide." *Oliver* case *supra*, 358 U.S., at 296; *Osfrofsky* v. *United Steelworkers of America*, 171 F. Supp. 782 (D. Md. 1959), aff'd 273 F. 2d 614 (4th Cir. 1960), cert. denied, 363 U.S. 849 (1960).

It is temerarious to find in Section 301 authority for judicial mutilation of the bargaining process (R. 33). Cf. *In re Green*, 369 U.S. 689 (1962). That Section was designed to enhance respect for collective agreements by guaranteeing enforcement against defaulters. To allow disaffected individuals or groups to stymie joint administration is to "turn the blade inward," for exercise of power to interpret, modify,

and apply collective agreements is performance, not default, of the bargaining process. To treat frustration of administration as a function of judicial enforcement is to stand federal policy on its head. The authority of the bargaining agent "acting in the collective interest of those whom it represent[s], to agree with the employer" (*Hildreth* v. *Union News Co.*, 315 F. 2d 548, 55 (6th Cir. 1963)), is established by Section 9(a) and 8(d). Exercise of that authority obviously cannot "be treated as a breach of the collective bargaining agreement." *Ibid.*

Smith v. *Evening News Ass'n.*, 371 U.S. 195, 200 (1962), suggests nothing contrary. It holds only that Section 301 does not exclude "all suits to vindicate individual employee rights arising from a collective bargaining agreement." But the only individual rights which Section 301 can be read as authorizing courts to recognize are those consistent with the statutory allocation of authority between individual and collective interests; rights which can be vindicated without injuring the collective bargaining process. Individual "rights" at odds with superior collective interests cannot be comprehended by Section 301. For the boundaries of that Section are marked by "the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 446, 456 (1957); *Teamster Local* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1960). That policy forbids transforming the Section into a leviathan devouring the collective interest to satisfy individual claims. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944). Power to enforce individual contract rights is itself but an aspect of the broader policy of promoting collective bargaining.

We have shown that the authority of the exclusive representative and the nature of collective bargaining

preclude considering individual "rights of tenure" superior to the power of contracting parties to agree. Such individual "rights of tenure," therefore, cannot ground a Section 301 challenge to their agreement.

II.

THE DOVETAILING DECISION IS A PRODUCT OF FAIR REPRESENTATION

A. The Representative Was Required to Resolve the Conflict of Interest Among Its Constituents

Attack upon the Union's role in the grievance proceeding reflects total misconception of the nature and responsibilities of statutory exclusive representation. To the court below, as to the complainants (R. 3), it appeared that the only "legitimate business" the Union could have was to "espouse [the] rights" of Dealers' employees (R. 32). Exactly the opposite is true. The Union's only legitimate interest was to effectuate the collective interest. Had it represented the interest of Dealers' employees alone, or E & L's employees alone, the Union would have betrayed its statutory obligation to "the benefit of the whole." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 527 (1949).

The Union representatives thoroughly understood this. They recognized the conflict between the long range interest of all and the short range interest of some; they accepted responsibility to "protect people in spite of themselves" (R. 58-59). Cf. *Parks* v. *IBEW*, 314 F. 2d 886, 906 (4th Cir. 1963), cert denied 372 U.S. 976 (1963). There is no room for even the slightest suggestion that dovetailing did not express "honest desires for the protection of the interests of all members of the Union." *Campbell* case, *supra*, 337 U.S., at 529.

As the court below saw it, however, "antagonistic" interests barred the Union from taking a position adverse to Dealers' employees (R. 32). It applied a test of disqualification applicable to attorneys or common law agents who owe undivided allegiance to an individual principal. Such a test, obviously, would destroy collective bargaining completely, for it would disqualify the representative whenever a conflict exists among members of the bargaining unit. Since some conflict almost invariably exists, or at least could be invented, such a test would enable a disgruntled individual or group absolutely to paralyze the bargaining agent. That is exactly the source of frustration the majority rule principle cut off. If majority rule did not prevent minorities from thwarting Union control of grievance adjustment "collective bargaining would have little substance, for what was made collectively could be promptly unmade individually." *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 346 (1944).

Section 9(a) repudiates common law agency concepts: "in placing a non-consisting minority under the bargaining responsibilities of an agent selected by a majority of the workers, Congress has discarded common law doctrines of agency." *Brooks* v. *Labor Board*, 348 U.S. 96, 103 (1954). "The question whether the collective agent has authority * * * does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre." *Elgin, J. & E. R. Co.* v. *Burley*, 326 U.S. 801, 803 (1946). Consequently, "[w]hen the employee and the union are in disagreement [the Union is not necessarily disqualified;] the question is * * * the extent to which the one may conclude the other." *Employees* v. *Westinghouse Corp.*,

348 U.S. 437, 439 (1955). *Burley* teaches that the employee is empowered to conclude the exclusive representative only in the area of fully accrued and vested individual rights. On all bargainable issues, the representative necessarily concludes the employee.

This result follows from Congress' substitution for inapposite agency concepts the political analogy which casts the representative democratically chosen by a majority in the role of legislator with power, by virtue of its status, "both to create and to restrict the rights of those whom it represents." *Steele* case, *supra*, 323 U.S., at 204. The very essence of the statutory function of such a representative is to mediate and balance the conflicting interests of individuals and groups in the appropriate unit, to promote the welfare of all. During the contract term that function is frequently, if not always, performed through the grievance procedure because the bargaining agent's resolution cannot be effectuated without the employer's consent and approval. The employer may well be and generally is neutral in such controversies, leaving the burden of decision with the employees' bargaining agent (Sayles, *Seniority: An Internal Union Problem*, 30 Harv. Bus. Rev. 55, 56 (1952); Kahn, *Seniority Problems in Business Mergers*, 8 Ind. & Lab. Rel. Rev. 361, 362 (1955)), but his participation and consent is nonetheless required to assure enforcement.

> "When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. . . . A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes

with the employer." Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 626-627 (1956).

The court below completely missed the point by considering the proceeding an arbitration of vested rights (R. 32). In actuality, its statutory purpose was to resolve legislatively the clash of interest between Dealers' and E & L employees. Seen in that perspective, the charge that Dealers' employees were victims of substantive or procedural unfairness is footless.

The cases teach that individuals and groups have no right whatever to participate in any phase of the collective bargaining process which looks to the future.[18] The power which Section 9(a) reserves to individuals to adjust their own "grievances," must be read in the *Burley* sense, as restricted to retroactive claims, pp. 22-24, *supra;* otherwise, the Act would be self-defeating.

> "[T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imaginative and informed choice of available alternatives in construing an agreement. Whether

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[18] *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944); *Medo Corp.* v. *Labor Board*, 321 U.S. 678, 684 (1944); *May Stores Co.* v. *Labor Board*, 326 U.S. 376, 384 (1945); *Labor Board* v. *Crompton Mills*, 337 U.S. 217 (1949); *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342 (1944).

> the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future."[19]

Therefore, assuming, *arguendo*, that individuals or groups in immediate competition with grievants, who stand to lose by adjustment in grievants' favor, are entitled under Section 9(a) to the same right as grievants, Dealers' employees would not have had standing as of right in the grievance proceeding. Grant could not have deprived any Dealers' employee of accrued earnings. Consequently, under federal law, Dealers' employees had no more vested interest in denial than E & L employees had in allowance. See Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 633 (1956). Thus, the complaints that respondents were "misled" as to the position Priddy would take (R. 28); that they relied on the Local Union to represent and uphold their interests against petitioners (*ibid.*); and that the stewards who represented respondent in Detroit were not "prepared or qualified to make a presentation" (R. 32), pleaded no breach of legal duty. *Vis-a-vis* both groups the Local Union and its representatives were in the position of a Congressman or Senator. Since employee participation in the legislative grievance process is merely a matter of grace, inadequate notice can violate no right and disappointment with legislative representation is not legal injury.

"The bargaining agent is * * * not required to consult with the individual members or give them notice

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[19] Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Col. L. Rev. 730, 748, 755 (1950); Cf. Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 620 *et seq.*

of contemplated contractual actions within the scope of its authority. It has the authority to bind its principal, if it acts within the statutory provisions." *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 56 (10th Cir. 1956), cert. denied 351 U.S. 918 (1956); *Outland* v. *C.A.B.*, 284 F. 2d 224, 226 (D.C. Cir. 1960); *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465, 473 (M.D. Pa. 1959); *Coley* v. *Atlantic Coast Line R.R.*, 221 N.C. 66, 19 S.E. 2d 124, 126 (1942). To vitiate an agreement for lack of notice "would becloud collective bargaining with an invitation to the use of evasive tactics rather than clarity and purpose and would place the courts in constant attendance at the bargaining table * * *." *Napier* v. *System Federation No. 91*, 127 F. Supp. 874, 891 (W.D. Ky. 1955). Even if there had been a "misrepresentation"[20] of the position Local 89 would take, the validity of the Committee's Agreement would not have been affected. *Durandetti* v. *Chrysler Corp.*, 195 F. Supp. 653, 655-656 (E.D. Mich. 1961).

B. Dovetailing Was Within the Scope of the Representative's Discretion

In the *Huffman* case, *supra*, this Court stated that the (345 U.S., at 337, 338, 339):

> "statutory obligation to represent all members of an appropriate unit requires [the bargaining agent] to make an honest effort to serve the in-

[20] Actually, the insinuation of deception against Local 89's officers is as lacking in factual basis as the simile in which it is cast (R. 28). Those officers consistently explained both to Dealers' and to E & L's employees that dovetailing would depend on whether or not there was a merger or absorption of E & L's business by Dealers (R. 46, 57). As far as the record shows, their predictions were honestly based upon "current available information" (R. 46, 47, 49-50, 57).

terest of all of those members, without hostility to any. * * * [Negotiators have] discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented * * *. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. * * *

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility."

That this standard sustains the dovetailing decision is scarcely to be doubted.

"The merger of two companies like the consolidation of once-separate operations into a single plant often gives rise to sharp conflicts of interest in working out the relative seniority rights of two once separate groups of employees but the courts have invariably—and wisely—refused to become entangled in the merits of a conscientiously negotiated solution." Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 161 (1957).

Of course whenever job opportunities or security are diminished, no solution can satisfy all of the employees. But, "it is not violative of federal law that a union not satisfy all employees or that it improperly balance the rights and obligations of the various groups

it represents." *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (2d Cir. 1959). Dovetailing "on the basis of each employee's length of service with his original employer * * *" is generally, indeed, considered the most equitable solution. Kahn, *Seniority Problems in Business Mergers*, 8 Ind. & Lab. Rel. Rev. 361, 378 (1955); *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263, 266 (2d Cir. 1953), cert. denied, 346 U.S. 826 (1953); *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 226 (D.C. Cir. 1960). It is as common as merger and absorption are widespread.[21]

Dovetailing does not become discriminatory because employees of one employer have longer service than employees of the other. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953). "The seniority principle necessarily adversely affects some employees, particularly the younger employees." *McMullans* v. *Kansas, Oklahoma and Gulf Ry. Co.*, 229 F. 2d 50, 53 (10th Cir. 1956), cert. denied, 351 U.S. 918 (1956).

Both the National Labor Relations Board and the courts hold that dovetailing is within the ambit of the exclusive representative's statutory authority and discretion. *NLRB* v. *Wheland Company*, 271 F. 2d 122, 124-125 (6th Cir. 1959); *Holman* v. *Industrial Stamp-*

[21] Where, as in the transportation industry, "there is frequently consolidation and pooling of operations" the "practice * * * is generally to protect the employees, to the extent possible, against loss of seniority as a result of the merger." 2 BNA, COLLECTIVE BARGAINING-NEGOTIATIONS AND CONTRACTS (5-26-61), 75:201. "Every industry with seniority practices has encountered seniority integration disputes at least sporadically, while some, especially in transportation, have been plagued by them. Although no satisfactory aggregate statistics are available on the frequency or magnitude of these disputes, they constitute an important industrial relations problem." Kahn, *op. cit., supra*, at pp. 362, 363.

ing Co., 142 F. Supp. 215, 218 (E.D. Mich., 1956); Administrative Ruling of the General Counsel, Case No. SR-1973, May 17, 1962, 50 LRRM 1360.[22]

The court below considered dovetailing impermissible because it enhances "the influence of the union" (R. 32). But encouragement of unionization by enhancement of its influence is both object and consequence of compulsory collective bargaining. "The truth is that the union is a service agency that probably encourages membership whenever it does its job well." *Teamsters Local* v. *Labor Board*, 365 U.S. 667, 675-676 (1961). Even otherwise forbidden discrimination which manifestly encourages union membership is allowed, if it is incident to protection of the group interest in efficient collective bargaining. Superseniority for union stewards is not forbidden discrimination because:

> "they are in a special relation to collective bargaining for the benefit of the whole union. To [favor] them as such is * * * but a due regard of union interests * * *." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 527 (1949).

To contravene federal standards, a decision to dovetail would have to reflect malice against one group or irrational preference for the other. To upset dovetailing, "arbitrariness * * * of the bad faith kind, * * *

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[22] Accord: *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9th Cir. 1953), cert. denied 346 U.S. 931 (1954), rehearing denied 347 U.S. 924; *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa. 1959); *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528 (1956), cert. denied 351 U.S. 985; *Walker* v. *Penn-Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A. 2d 453, 462-463 (1948); *Pratt* v. *Wilson Trucking Co.*, 214 Va. 385, 104 S.E. 2d 915 (1958).

[s]omething akin to factual malice" (*Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (1959)); "an intent to hostilely discriminate against a portion of the union's membership" (*Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 185 (9th Cir., 1962), cert. denied 371 U.S. 920 (1962)) must be shown. There is neither allegation, evidence nor finding of that here.

On the contrary, Priddy thought he could predict the result "on the basis of prior rulings on matters of this nature" (R. 28). Obviously, therefore, the decision constituted application of a general principle or policy, not a discriminatory innovation. Cf. *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963). On the findings of the court below (R. 29), Dealers' employees were disadvantaged only because "E & L's Louisville Terminal evidently is older than that of Dealers [which] means that by and large E & L employees will have the greater seniority in the event the merger of seniority boards stands." Adverse consequences of "the conventional sequence of seniority" (*Campbell* case, *supra*, 337 U.S., at 524) are not indicia of discrimination.

Demonstration that dovetailing was the product of fair representation shows that nullification is in irreconcilable conflict with federal policy and therefore cannot possibly stand. We now undertake to show, however, that insofar as the complaint charged the bargaining agent with unfairness, the Kentucky courts were powerless *ab initio* to entertain it, for the federal duty of fair representation occupies that field and its enforcement is not within the province of state courts.

III.

THE FEDERAL DUTY OF FAIR REPRESENTATION OCCUPIES THE FIELD TO THE EXCLUSION OF STATE LAW AND STATE COURTS

The court below erroneously conceived the pre-empted area as limited to discrimination based on union activity, on the theory that only such discrimination can produce an unfair labor practice (R. 33). It thereby overlooked both the grant of power to the exclusive representative to resolve conflicts of interest among its constituents and the correlative duty of fair representation, with their "inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board*, 353 U.S. 1, 10 (1957).

> "Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract, . . . resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. * * *" *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957).

The duty of fair representation, of course, is not limited to non-discrimination for union membership or activity. Its preemptive impact upon state power does not turn, as we shall show, on the as yet undecided question whether violation is an unfair labor practice.[23] Cf. Cox, *The Duty of Fair Representation*, 2 Vill. L.

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[23] "A majority of the Board has recently reached the novel conclusion that, under the general principle laid down in *Steele* * * * a union violates the Act if it seeks unfair discrimination, even if that discrimination is not based on union membership or activity. *Matter of Miranda Fuel Company*, 140 NLRB No. 7, 51 LRRM 1584 (1962)." *NLRB* v. *Local 294, Teamsters*, 53 LRRM 2248, 2250, n. 4 (2d Cir., May 21, 1963); *Plumbers' Union* v. *Borden*, 373 U.S. 690, 696, n. 7 (1963).

Rev. 151, 172 (1957); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 333 (1955).

The very pendency of that arguable question suffices, however, to show that, at least at this time, there can be no room for state intrusion. *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1963); *Incres Steamship Co.* v. *International Maritime Workers U.*, 372 U.S. 24, 27 (1963); *SanDiego Unions* v. *Garmon*, 359 U.S. 236, 246 (1959). In asserting jurisdiction over the relationship between the exclusive bargaining agent and its constituents, and in bringing concepts derived from state law to bear on that relationship, the court below invaded an exclusively federal domain.

That only federal law can be permitted to govern the scope and nature of the duty of the exclusive bargaining agent, as such, to its constituents would seem to follow from the fact that their relationship is a product of exclusive and preempting federal law. If a single uniform body of substantive law is required even in the field of contract enforcement (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962)), *a fortiori* is it required in the area of obligations owed by the collective bargaining agent to its constituents. Governance of the relationship inextricably involves and decisively shapes the capacity of the exclusive representative to perform its federal functions. So interrelated is the duty to represent fairly with exclusive power to bind constituents that a uniform body of federal law is not enough; if federal policy is to prevail, its enforcement can be entrusted only to federal tribunals.

In this respect the federal duty to observe contracts differs decisively from the duty to provide fair representation. The former applies to employers as well as to bargaining agents. As this Court demonstrated in

Dowd Box, that duty was superimposed by Congress upon a pre-existing body of state law which Congress fundamentally approved and desired to continue. Congress considered the duty inappropriate for enforcement by the National Labor Relations Board. Thus, "the purpose of conferring jurisdiction upon the federal courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." 368 U.S., at 511.

Similarly, the duty of bargaining agents to provide fair representation differs from the contractual duty of unions to members. *Machinists* v. *Gonzales,* 356 U.S. 617 (1958). The "protection of union members in their rights as members" under constitutions and bylaws is "traditional" state court jurisdiction (356 U.S., at 62), and not "within the Board's competence." *Plumbers' Union* v. *Borden,* 373 U.S. 690, 697 (1963).

In contrast, the power of exclusive representation, from which the duty of fairness springs, displaced antithetical state common law concepts which Congress disapproved. The Board is empowered to and does police performance of that duty through its power over certifications. *Larus & Brother Co.,* 62 NLRB 1075 (1945); *Hughes Tool Co.* v. *NLRB,* 147 F. 2d 69, 74 (5th Cir., 1945). Consequently, whether enforcement by injunction is ultimately held to be the exclusive province of the Board, the exclusive province of the federal courts, or the concurrent province of both, state tribunals must be excluded. There is no more reason to believe that Congress would have welcomed state court enforcement of the bargaining agent's unique federal duty than it welcomed state court enforcement of its unique correlative right.

IV.

FEDERAL SUPREMACY MUST BE EFFECTIVELY PROTECTED

In *Oliver*, the Supremacy Clause was violated by invocation of a statute of "broad general application."[24] Here it is violated by invocation of common law labor relations policy. Since the court, as policy maker, is an arm of the State (*Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953)); the conflict with federal policy is of constitutional dimensions. *Capital Service* v. *Labor Board*, 347 U.S. 501 (1954); *In re Green*, 369 U.S. 689 (1962); *Plumbers Union* v. *Borden*, 373 U.S. 690 (1963); *Iron Workers* v. *Perko*, 373 U.S. 701 (1963); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153, 178, n. 13, (1962).

Disclaimer of intention "to exercise any jurisdiction in the field of national labor policy" (R. 33) obviously does not immunize encroachment. Disclaimer rather attests blindness to the elements of which national labor policy is composed. This case is certainly the classic illustration of Professor Summers' observation that many state courts "have not proven themselves hospitable to, or even aware of, national labor policy." Labor Law Decisions of the Supreme Court, 1961 Term, in ABA Section of Labor Relations Law Proceedings 51, 63 (1962). The Sixth Circuit epitomized the consequence in *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961):

> "Unless such bilateral decisions, made in good faith and after unhurried consideration between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy

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[24] *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959).

contemplated by the philosophy of the law which makes its use compulsory."

The attack upon the Joint Committee's decision "strikes at the very core of federal labor policy." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

This case highlights the danger to collective bargaining which inheres in assertion of jurisdiction by state courts steeped in common law traditions and unfamiliar with the premises of the federal Act. For almost two years Kentucky will have thwarted the goals of the federal scheme and deprived petitioners of its benefits. This Court should make it clear that the preempted area is not narrowed by Section 301 and that state courts may not intrude upon either the relationship between an exclusive bargaining agent and its constituents or the collective bargaining process.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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APPENDIX

Labor Management Relations Act, 1947, 61 Stat. 136. 29 U.S.C. 141, et seq.

Sec. 1. • • •

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

• • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

• • • •

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise • • •

• • •

(5) The term "labor organization" means any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with em-

ployers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

* * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder * * *. The duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in re-

spect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 203(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *

Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.